IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 34 of 1985

KANHAIYA LAL
V/S
KALIYA & ORS.

Mr. MANISH SHISHODIA, for the appellant / petitioner

Date of Order : 18.7.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the plaintiff. The suit was decreed by the learned trial Court, and has been dismissed by the Appellate Court.

The facts of the case are, that on 16.10.78 the plaintiff appellant filed a suit against respondent No.1 Kaliya, alleging inter-alia, that defendant had taken on rent, a house from the plaintiff which house was in mortgage with the plaintiff, belonging to one Heera S/o Amarji and the defendant is thus tenant in the property and the plaintiff is the landlord. It was then alleged that the defendant has not paid rent since May 1978, and that the plaintiff does not want to keep him the tenant any more, therefore, a notice determining tenancy was given on 28.7.78, which was received by the defendant on 4.8.78, whereby the tenancy was determined w.e.f. the midnight of 30.9.78. With these averments, suit for recovery of

possession alongwith mesne profits has been filed. In this suit, defendant Kaliya filed an admitting written-statement and in additional plea, it was pleaded, that he has let out the premises to Heera, who had died, and his heirs are living there, who are necessary party in the suit. On filing of this written-statement, the plaintiff filed an application pleading that the defendant No.1 has taken an objection about having inducted Heera as sub-tenant, who having died, his heirs are living, therefore, they are also required to be impleaded as party defendants. This application was allowed, and amended plaint was filed, wherein these heirs of Heera were impleaded as defendants No.2 to 7. After service of summons a written-statement was filed by defendant No.3, denying the factum of the property having been mortgaged by Heera, and it having been let out to Kaliya, or his having let out to Heera. It was pleaded that these defendants and Heera are living in this house since beginning, as owners, and are not tenant of anybody. Other pleadings of the plaint were denied. The title of the plaintiff was also denied, and it was also pleaded, that the house is situated on agricultural land, therefore, this Court has no jurisdiction. It was also pleaded, that the property belongs to person belonging to ST, wherein no title is conferred on the plaintiff.

Learned trial Court framed many issues, however, the crucial issues were issues No.1 and 2, being as to

whether Heera has mortgaged the property by conditional sale to the plaintiff, and that the property was let out by the plaintiff to defendant No.1, the other being, as to whether the plaintiff was not authorised to let out the premises to the defendant No.1.

Before the trial Court the plaintiff produced the rent note executed by Kaliya as Ex.1, notice determining tenancy is produced as Ex.2, while Ex.3 and 4 are the document showing the service of that notice. In oral evidence the plaintiff examined himself as P.W.1, scribe of the rent note has been produced as P.W.2, and the defendant No.1 examined himself as D.W.1, while one Nathu was produced as D.W.2, and defendant No.2 has appeared as D.W.3.

Learned trial Court decided issues No.1 and 2 by relying upon the evidence of the plaintiff, by observing, that in the present suit for eviction the title of the plaintiff is not to be decided, and since execution of Ex.1 rent note is proved, and defendant No.1 has admitted to be the tenant, and therefore, these two issues were decided in favour of the plaintiff, and the suit was decreed. Against this decree, the defendants No.2 to 7 filed appeal; and the learned lower Appellate Court, while deciding these two issues, found that the plaintiff has not produced the mortgage deed, and the factum of mortgage is not proved in

accordance with law. Then D.W.1 Kaliya has proved the terms of the mortgage by way of conditional sale, and that the circumstances show, that the defendant No.1 is in collusion with the plaintiff. Adverse inference was drawn for non-production of the mortgage deed. Then evidence of D.W.3 and D.W.2 was discussed, various infirmities in the evidence of Kaliya were noticed, and it was found, that the plaintiff has failed to prove the property to have been mortgaged, and it was never let out by the plaintiff to Kaliya, rather the rent note was executed as a sham document, and the premises were never let out to Kaliya, nor any rent was paid by Kaliya. In this sequence, the inconsistency in the pleading of the plaint (para-7) was also noticed.

This appeal was filed on 21.11.84 and was admitted on 21.1.86, by framing the substantial questions, viz., as to whether the learned lower Court was wrong in holding that since the factum of mortgage with conditional sale was not established as the mortgage deed has not been produced the relationship of landlord and tenant between the appellant and the respondents is also not proved. The other question framed was, whether the mortgage deed now sought to be proved under O.41 Rule 27 CPC, may be taken into consideration. It appears from the file, that on 13.8.85, an application was filed under Order 41 Rule 27 CPC duly supported by an affidavit. In the affidavit, it was contended, that the suit was filed for eviction, and the

question of title was not required to be examined, therefore, original mortgage deed was not produced, though it is a registered document, genuineness whereof is not doubtful. Then in para-4 of the affidavit, it was also pleaded, that the defendant-Vakta has filed an application under Section 5 of the Debt Relief Act, certified copy of that application is also required to be taken on record, and on the basis of the averments of the affidavit, it was prayed that the documents be allowed to be produced as additional evidence. The photo copy of the registered mortgage deed, and certified copy of the application u/s.5 of the Debt Relief Act, had been filed by the appellant in this Court on 29.4.85.

It was contended by learned counsel for the appellant, that in the circumstances of the case, since the learned lower Appellate Court has negatived the suit, substantially on the ground, that the plaintiff did not produce the mortgage deed, and did not prove the mortgage, while the mortgage is by way of a registered document and production thereof was not necessary in the trial Court, in the suit being for eviction, plain and simple, it was not produced, however, to clear the conscious of the Court, the document is sought to be produced under Order 41 Rule 27. Likewise, after decree of the suit by the trial Court, the defendants filed an application u/s.5 of the Debt Relief Act, wherein also, the defendants admitted the present

transaction, and therefore, that constituted an admission of the defendants, certified copy of that application is also required to be taken on record, as this document did not come into existence till the suit was decided by the trial Court.

Then arguing on merits, it was contended, that since the mortgage is a registered document and from the application u/s.5 of the Debt Relief Act, the factum of mortgage is not disputed, and since from the evidence led on the side of the plaintiff, the rent note Ex.1 is duly proved, which bears attestation by Heera, the ancestor of defendants No.2 to 7, and therefore, it is clearly established, that the premises were let out to defendant No.1, and since defendant No.1 has clearly pleaded, that he had further let it out to Heera, the suit is required to be decreed.

I have considered the submissions, and have gone through the record very closely.

If the matter were to be taken, on the superficial or on purely technical considerations, then of course it may be, that there is a registered mortgage deed, being mortgage by way of conditional sale of the property by Heera, in favour of the plaintiff, being document of July 1970, and then thereafter is a rent note executed by

defendant No.1 in favour of the plaintiff in August 1970, and the version of the defendant No.1 is, about having further let out the premises to Heera, and having admitted the rent note being Ex.1, the suit is required to be decreed. As against this, if the matter were to be considered in little depth, and some attempt is made to find out the real truth, emerging from the totality of circumstances, available on record, it clearly appears, that of course the property was mortgaged by Heera to the plaintiff by way of mortgage by conditional sale for a sum of Rs.2500/- by registered mortgage deed, but then, the remaining part of the story, of the property having been let out by the plaintiff to Kaliya, and Kaliya in turn having it let out to the ancestor of defendants No.2 to 7, Heera, appears to be only a paper transaction, and made up story by the plaintiff and defendant No.1, being hands in gloves.

The learned lower Appellate Court, apart from attaching much weight to non-production of the mortgage deed has also appreciated the evidence, and highlighted the other fallacies in the evidence of the plaintiffs, if read in conjunction with the evidence of Kaliya, which clearly show, that the story of letting out the premises to Kaliya, and his having let out to Heera, is all a myth. At the same time, since the application u/s.5 of the Debt Relief Act is of the year 1983, now being the year 2006, I asked the

learned counsel for the appellant, as to the progress or out come of the debt relief proceedings, and it was informed that, that application had been decided in favour of the debtor, vide judgment dated 22.12.86, whereby the mortgage loan was determined, and directed to be repaid in 9 installments of the amounts specified in the order. Since learned counsel for the appellant is not in possession of authenticated certified copy of the order, he could not produce it, and only conveyed the above factual information.

Having considered the submissions and having perused the record, in my view, I am at one with the findings of the learned lower Appellate Court, where the learned lower Appellate Court was found, that the rent note is only a sham document, manufactured in collusion with the defendant No.1 by the plaintiff. True it is, that the stories have been intelligently manufactured, by rent note being dated one and a half month later than the mortgage deed, but then, a look at the statement of Kaliya, D.W.1 shows, that he has categorically stated that he never lived in the house. A look at the site plan annexed in the mortgage deed shows, that the house of the plaintiff and the property in question are just adjacent to each other, and in that background, when the plaintiff doesn't choose to disclose, as to since when defendant No.2 to 7 are living in the property, rather in the original plaint, he even doesn't choose to take cognizance on their presence in

the property, despite being the immediate neighbors, and a long period of around 8 years has elapsed between the date of rent note and the suit, and also pleading to having been received rent right upto May 1978, are million dollar circumstance, to show, that as a matter of fact, notwithstanding recitals in the mortgage deed, actual physical possession of the property never changed hands, and in order to simulate the transfer of physical possession, the rent note was got executed from Kaliya, who clearly appears to be a pawn in hands of the plaintiff, while the categoric and consistent case of the defendants No.2 to 7, all through is, that they are continuously living in the property uninterruptedly, and it is writ large, that on the suit being decreed by the learned trial Court, they found the possession to be in danger, and therefore, immediately approached the Debt Relief Court for determination of the debt. It is significant to note, at this place again, that the mortgage is of the year 1970, it is by way of conditional sale, stipulating that if the amount is not paid within two years, the mortgagee will become the purchaser, still the debt relief application was filed in the year 1983, which has been decided in 1986, after contest by the plaintiff, and therein, the plaintiff has not found to have become the owner of the property, and by treating him only to be creditor, he has been held entitled to the loan amount, to be repayable in 9 installments. Thus, it is clear that if properly

considered, and as rightly considered by the learned Lower Appellate Court, that rent note Ex.1 notwithstanding, relationship of landlord and tenant never come into existence between the parties, and therefore, the plaintiff is not entitled to decree for eviction as prayed.

Thus, even after accepting the appellant's application under Order 41 Rule 27 C.P.C., I do not find any force in the appeal. The same is, therefore, dismissed.

(N P GUPTA),J.

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